A **HARIANTO EFFENDY ZAKARIA & ORS**

v.

MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

B FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP FCJ
HASAN LAH FCJ
ZALEHA ZAHARI FCJ
JEFFREY TAN FCJ
C RAMLY ALI FCJ
[CIVIL APPEAL NO: 01(f)-6-03-2012(W)]
20 OCTOBER 2014

LABOUR LAW: *Trade union - Picketing - Lawful trade union*
D *picketing by employees against employer bank - Picketers barged into lobby and banking hall - Bank issued letters of suspension to 15 employees - Appellants found guilty and dismissed from service while five others not dismissed - Punishment of dismissal - Whether warranted and proportionate to findings of misconduct - Whether courts below took into*
E *consideration that appellants were long standing employees of bank - Whether there was unequal treatment in dismissing appellants*

EMPLOYMENT: *Unfair dismissal - Picketing - Appeal from Court of Appeal - Lawful trade union picketing by employees against employer bank - Picketers barged into lobby and banking hall - Bank issued letters*
F *of suspension to 15 employees - Appellants found guilty and dismissed from service while five others not dismissed - Whether there was unequal treatment in dismissing appellants*

The appellants were employees of the second respondent prior to
G their dismissal on 27 April 2004 and were active members of the National Union of Bank Employees ('NUBE'). In October 2003, NUBE and some of its members commenced a lawful trade union picketing outside the second respondent's premises ('the BCB building') for five days in relation to NUBE's dissatisfaction with
H the second respondent over several work-related matters and certain terms and conditions of employment. The second respondent claimed that the picketers moved from the front of the BCB building and proceeded towards the side entrance, holding placards and balloons. They then barged through the side
I entrance despite attempts by the security officers to prevent them from doing so. The second respondent further claimed that the picketers proceeded to the lobby and entered the banking hall and

this conduct was captured on the second respondent's security closed circuit television. This prompted the second respondent to issue letters of suspension to 15 employees, including the appellants, from duty pending further investigations into their conduct. As a result of a domestic inquiry carried out against all 15 employees, three were found not guilty while two others, namely Maimunah and Rohana, were found guilty initially but their suspensions were uplifted after their respective pleas of mitigation. The appellants, however, were found guilty as charged and were terminated. The Industrial Court concluded that the appellants' dismissal was with just cause or excuse. The decision was affirmed by the High Court and the Court of Appeal. Hence, the present appeal. The issues that arose before the Federal Court was (i) whether the punishment of dismissal was warranted and in proportionate to the findings of misconduct; (ii) whether the courts below took into consideration the fact that the appellants were long standing employees of the second respondent; and (iii) whether the second respondent was guilty of unequal treatment because five of the employees who were charged together with the appellants were not dismissed.

Held (dismissing appeal with costs)
Per Hasan Lah FCJ delivering the judgment of the court:

(1) The dismissal of the appellants by the second respondent was fair and was proportionate to the misconduct committed by them. The charge against the appellants was a very grave misconduct involving the core of the second respondent's business and the appellants must have been aware that dismissal would have been the inevitable punishment. (paras 45 & 46)

(2) There is no fixed rule of law to suggest that it was unreasonable to dismiss employees with unblemished records for a single instance of insolence. The appellants' actions were clearly a wilful disobedience. Their action brought the second respondent into disrepute among customers and other employees. The Industrial Court did take into consideration the misconduct and the fact that the second respondent was in the banking industry. In a number of cases, the Industrial Court had held that the banking industry belonged to a special kind of business and services rendered to the public. Therefore, a standard of care and conduct was expected of an employee in the banking industry. (paras 43 & 44)

(3) There was no merit in the appellants' contention that the appellants' dismissal was actuated by discriminative practice. The allegation of the inconsistency of punishment of the five employees who were charged together with the appellants was misconceived. Unlike Maimunah and Rohana, the appellants did not apologise to the second respondent for their action even though they were given the opportunity to do so. They showed no remorse. The conduct of the appellants after the offence was established must be taken into account in deciding whether it was reasonable to dismiss them or not. (paras 40 & 42)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu merupakan pekerja-pekerja responden kedua sebelum pemecatan mereka pada 27 April 2004 dan merupakan ahli-ahli Kesatuan Kebangsaan Pekerja-pekerja Bank ('NUBE'). Pada Oktober 2003, NUBE dan sebilangan ahli-ahlinya telah memulakan piket kesatuan sekerja di luar premis responden kedua ('bangunan BCB') selama lima hari berkenaan ketidakpuasan hati terhadap responden kedua bagi hal-hal bersangkut-paut dengan kerja dan beberapa terma dan syarat pekerjaan. Responden kedua mendakwa bahawa ahli-ahli piket mara dari bahagian hadapan bangunan BCB dan menuju ke pintu masuk tepi, sambil memegang tanda-tanda dan belon-belon. Mereka kemudiannya menerobos masuk melalui pintu masuk tepi walaupun terdapat percubaan-percubaan oleh pegawai-pegawai keselamatan menghalang mereka daripada berbuat sedemikian. Responden kedua mendakwa bahawa ahli-ahli piket terus ke lobi dan memasuki dewan perbankan dan tindakan ini dirakam dalam televisyen litar tertutup keselamatan. Ini menyebabkan responden kedua mengeluarkan surat-surat penggantungan kepada 15 orang pekerja, termasuk perayu-perayu, daripada tugas sementara menunggu siasatan lanjut tindakan mereka. Hasil daripada siasatan domestik yang dijalankan ke atas kesemua 15 pekerja, tiga didapati tidak bersalah manakala dua lagi, iaitu Maimunah dan Rohana, pada asalnya didapati bersalah tetapi penggantungan mereka ditarik selepas rayuan mitigasi masing-masing. Perayu-perayu walau bagaimanapun, didapati bersalah seperti yang dipertuduh dan dipecat. Mahkamah Perusahaan memutuskan bahawa pemecatan perayu-perayu adalah dengan sebab atau alasan yang adil. Keputusan ini disahkan oleh Mahkamah Tinggi dan Mahkamah Rayuan. Oleh itu, rayuan ini. Isu-isu yang timbul di Mahkamah Persekutuan adalah (i) sama ada

hukuman pemecatan adalah wajar dan berpadanan dengan dapatan salahlaku; (ii) sama ada mahkamah bawahan mengambil kira fakta bahawa perayu-perayu adalah pekerja-pekerja lama responden kedua; dan (iii) sama ada responden kedua bersalah atas layanan tidak adil kerana lima daripada pekerja-pekerja tersebut dipertuduh bersama-sama dengan perayu-perayu tetapi tidak dipecat.

Diputuskan (menolak rayuan dengan kos)
Oleh Hasan Lah HMP menyampaikan penghakiman mahkamah:

(1) Pemecatan perayu-perayu oleh responden kedua adalah adil dan berpadanan dengan salahlaku yang dilakukan oleh mereka. Pertuduhan terhadap perayu-perayu adalah satu salah laku serius yang melibatkan perniagaan asas responden dan perayu-perayu semestinya sedar bahawa pemecatan adalah hukuman yang tidak boleh dielakkan.

(2) Tiada peraturan undang-undang tetap yang mencadangkan bahawa adalah tidak munasabah untuk memecat pekerja-pekerja tanpa kecacatan rekod atas satu kejadian tunggal penghinaan. Tindakan perayu-perayu jelas merupakan satu keingkaran sengaja. Tindakan mereka mencemar reputasi responden kedua dalam kalangan pelanggan-pelanggan dan pekerja-pekerja. Mahkamah Perusahaan telah mengambil kira salah laku dan fakta bahawa responden kedua adalah dalam industri perbankan. Dalam sebilangan kes, Mahkamah Perusahaan telah memutuskan bahawa industri perbankan terjumlah kepada perniagaan dan perkhidmatan khas yang diberikan kepada awam. Oleh itu, satu pengawasan dan perilaku standard dijangka daripada seorang pekerja dalam industri perbankan.

(3) Tiada merit dalam hujahan perayu-perayu bahawa pemecatan perayu-perayu adalah akibat amalan diskriminasi. Dakwaan ketidakselarasan hukuman lima orang pekerja yang dipertuduh bersama-sama dengan perayu-perayu adalah salah tanggapan. Tidak seperti Maimunah dan Rohana, perayu-perayu tidak memohon maaf daripada responden kedua bagi tindakan mereka walaupun telah diberi peluang berbuat sedemikian. Mereka tidak menunjukkan kekesalan. Tindakan perayu-perayu selepas kesalahan dibuktikan mesti diambil kira dalam memutuskan sama ada munasabah atau tidak untuk memecat mereka.

Case(s) referred to:

Abdul Wahab Hj Suboh v. CIMB Bank Berhad [2012] 4 ILR 445 ***(refd)***

Azizan Abd Ghani lwn. Bumiputra-Commerce Bank Berhad [2012] 3 ILR 436 ***(refd)***

British Leyland UK Ltd v. Swift [1981] IRLR 91 ***(refd)***

Chartered Bank v. National Union of Bank Employees [1983] 2 ILR 111 ***(refd)***

Hongkong Bank Malaysia Berhad v. Jaafar Ahmad Thani [2007] 4 ILR 601 ***(refd)***

Laws v. London Chronicle Ltd [1959] 2 All ER 285 ***(refd)***

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC ***(refd)***

Norizan Bakar v. Panzana Enterprise Sdn Bhd [2013] 9 CLJ 409 FC ***(refd)***

Perwira Habib Bank (M) Bhd v. Tan Teng Seng [1997] 2 ILR 839 ***(refd)***

Sunmugam Subramaniam v. JG Containers (M) Sdn Bhd & Anor [2000] 6 CLJ 521 HC ***(refd)***

Yahaya Talib v. Southern Bank Berhad & Anor [2009] 1 LNS 1785 HC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(3), 30(5), 40(1), 49(1)(i), (ii)

For the appellants - Ambiga Sreenevasan (Alex De Silva, Anand Ponnudurai & Kamini Visvanathan with her); M/s Bodipalar Ponnudurai De Silva

For 2nd respondent - T Thavalingam (Shaik Azrin Shaik Daud, Lisa Tan Yu Wan & Fara Nadia Hashim with him); M/s Lee Hishammuddin Allen & Gledhill

[Editor's note: For the Court of Appeal judgment, please see Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor [2013] 5 CLJ 733.]

Reported by Najib Tamby

JUDGMENT

Hasan Lah FCJ:

[1] This court had, on 7 March 2012, granted leave to the appellants to appeal on the following question of law:

> Whether by virtue of section 20(1) of the Industrial Relations Act 1967 the Industrial Court, in determining whether the dismissal of an employee was with just cause or excuse, is required to consider whether the punishment of dismissal was warranted in and proportionate to the findings of misconduct by the employer?

[2] The background facts are as follows. All of the appellants were confirmed employees of the second respondent prior to their dismissal on 27 April 2004. At all material times, the appellants were active members of the National Union of Bank Employees ("NUBE").

[3] In October 2003, NUBE and some of its members commenced lawful trade union picketing pursuant to s. 49(1)(i) and (ii) of the Industrial Relations Act 1967 in relation to a trade dispute between NUBE and the second respondent in connection with NUBE's dissatisfaction over several work related matters and certain terms and conditions of employment.

[4] The said picketing outside the second respondent's premises at Bangunan BCB No. 6, Jalan Tun Perak, Kuala Lumpur ("BCB Building") commenced on 9 October 2003 and continued on 13 October 2003, 14 October 2003, 20 October 2003 and 21 October 2003.

[5] On 21 October 2003, the appellants were outside of BCB Building at about 12.30pm to commence picketing. The picket ended at approximately 1.30pm.

[6] The appellants claimed that when the NUBE members and the appellants were approaching the side entrance of BCB Building to return to their respective work stations after the picketing the second respondent's security officers, who were on duty, blocked the said entrance by forming a barricade to prevent the NUBE members and the appellants from returning to their respective work stations.

[7] As a result of the lock out, the NUBE officials made sure that their members, including the appellants, were permitted to return to their work stations without any further intimidation/ harassment by the second respondent's security officers. The appellants denied that they participated in any picket within the premises of the second respondent.

[8] The second respondent on the other hand, claimed that at or about 1.25pm on 21 October 2003 the picketers moved from the front of the BCB Building and proceeded towards the side entrance of BCB Building holding placards and balloons. They thereafter barged through the side entrance despite attempts by security personnel to prevent them from doing so.

[9] The second respondent also claimed that this group of picketers thereafter proceeded to the lobby and entered the banking hall. After a couple of minutes, they left the premises and dispersed. Their conduct was captured on the second respondent's security closed circuit television.

[10] The second respondent claimed that the appellants, as employees, had conducted themselves in a manner that had disrupted the second respondent's business and operations. Their conduct also caused disrepute to the second respondent's image as a premier financial institution in the country.

[11] The second respondent then issued letters of suspension to 15 employees, including the appellants from duty pending further investigations into their conduct on 21 October 2003. The 15 employees, including the appellants, were then issued with show cause letters as to why disciplinary action should not be taken against them for participating in an unlawful picket on 21 October 2003.

[12] The reply to these letters was from NUBE for all of the appellants. *Vide* letters dated 2 December 2003, the second respondent requested the relevant employees to submit individual letters of explanation to the show cause letter that had been issued to them. The respective employees, including the appellants, replied *vide* letters dated 4 December 2003 and 8 December 2003 denying the allegations made against them.

[13] *Vide* letters dated 24 December 2003, the second respondent issued to the appellants notices to attend a domestic inquiry. The letters were issued after carrying out a thorough investigation into the matter and after all consideration of the explanation provided by the appellants in response to the show cause letters that had been issued to them. The charge that was levelled against the appellants was as follows:

> On 21 October 2003 there was a picket outside Bangunan BCB, Jalan Tun Perak. It is alleged that you had, as an employee of the Bank on 21 October 2003 between 1.29 p.m. and 1.34 p.m. entered into the premises of Bangunan BCB Jalan Tun Perak and participated in an unlawful picket within the premises. You had further conducted yourself in a manner that has led to the disruption of the Bank's business and operations and the same has caused disrepute to the Bank's image.

[14] The domestic inquiry was duly convened against all the appellants. At the said inquiry the appellants pleaded not guilty to the charge leveled against them. The appellants provided a common defence to the allegations. They basically denied the allegations.

[15] *Vide* letters dated 12 April 2004, the appellants were notified that they were found guilty as charged. The second respondent, before imposing any punishment, requested the appellants to submit in writing their plea in mitigation. The appellants replied in a standard form *vide* letters dated 19 April 2004.

[16] The second respondent then reinstated five of the 15 employees ie, Maimunah bte Mat Nor, Zamir bin Ahmad, Noor Jam bin Kader Mohiden, Ahmad bin Kassim and Rohana bte Abdul Samad.

[17] As for the appellants, *vide* letter dated 27 April 2004 their services were terminated with effect from same date.

Award Of The Industrial Court (First Respondent)

[18] The first respondent, in its Award No. 1266 of 2009 dated 27 October 2009 ("award") and after 12 days of hearing upheld the dismissal of all the appellants. The first respondent concluded that the appellants' dismissal was with just cause or excuse. In upholding the second respondent's decision the first respondent held that although the misconduct was a minor misconduct, a deterrent sentence was necessary as it affected the second respondent's goodwill. The first respondent said:

> Isu seterusnya ialah sama ada tindakan membuang YM-YM melainkan YM4 adalah berpatutan jika dilihat kepada tempoh masa YM-YM bekerja dengan responden dan dibandingkan dengan kesalahan yang dilakukan. Walaupun kesalahan tersebut boleh dianggap kecil tetapi jika dilihat kepada industri perbankan terutamanya yang melibatkan urusan pelanggan dan melibatkan nama baik syarikat maka kesalahan yang dilakukan oleh YM-YM melainkan YM4 adalah serius dan hukuman yang dikenakan perlulah berbentuk deteren. Oleh yang demikian, Mahkamah selanjutnya berpendapat tindakan membuang kerja YM-YM melainkan YM4 adalah berpatutan. Konklusinya Mahkamah mendapati pembuangan kerja YM-YM melainkan YM4 dibuat dengan alasan atau sebab yang adil. Oleh itu, permohonan YM-YM melainkan YM4 dengan ini ditolak. Manakala permohonan YM4 diterima.

Decision Of The High Court

[19] The appellants filed an application for judicial review to quash the award of the first respondent. The appellants contended that the Industrial Court had arrived at a totally perverse decision which was devoid of justification which no reasonable body or persons or tribunal in similar circumstance would have made. The appellants further contended that the Industrial Court had failed to consider and/or take into account relevant matters in arriving at its decision.

[20] Having heard the oral submissions of the respective parties on 21 October 2010, the High Court then dismissed the appellants' application with costs. In its judgment, the High Court concluded as follows:

> [31] The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it (*William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 CLJ 235 CA). Having perused and considered the documents produced, the submissions and the Award I find no error of law committed by the Industrial Court. The decision of the Industrial Court is not tainted with the infirmities of illegality, irrationality or procedural irregularity to merit curial intervention. For the above stated reasons the application is dismissed. Costs of RM500.00 to be paid by each Applicant to the 2nd Respondent.

[21] As regards the punishment of dismissal the High Court had this to say:

> [30] In the award the Industrial Court did take into consideration the misconduct and the fact that the 2nd Respondent is in the banking industry. The Industrial Court is of the view that the punishment of dismissal is appropriate. I am of the view that there is no error committed by the Industrial Court. The "fairness or unfairness of the dismissal is to be judged ... by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved. (Philips J in *N.C. Watling & Co. Ltd.*). Bearing in mind the "range of possible reasonable responses" and that the employer is "the best person to judge the seriousness of misconduct of an employee" the court ought not to substitute its own view on the punishment as different employers react differently to an employee's misconduct.

Court Of Appeal

[22] The appellants subsequently appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal unanimously dismissed the appellants' appeal with costs. On the issue of "victimization" the Court of Appeal held as follows:

> The appellant's argument relating to victimization was patently untenable premised as it was on conjecture. It is rather far-fetched to conclude that the appellants were victimized simply because they were active union members and there was breach of natural justice in the conduct of the domestic enquiry instituted to determine the charge against them.

[23] As regards the issue of punishment imposed, whether the dismissal was too harsh and was actuated by discriminative practice, the Court of Appeal opined:

> The final aspect of the appeal was in relation to the contention advanced on behalf of the appellants that the dismissal was too harsh and was actuated by discriminative practice. This was premised on the fact that five other employees of the 2nd Respondent were also participants in the illegal picket like the appellants but were either let off unpunished or given light punishments. In rejecting the argument that the punishment was too harsh the learned judge relied on the principle set out in *Said Dharmalingam Abdullah v. Malayan Breweries Sdn Bhd* [1977] 1 CLJ 646 and in our view rightly so. The Supreme Court had this to say at p. 660:
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> > We are prepared to accept, as a tenable proposition that, speaking generally, where misconduct has been proven, different employers might react differently. To quote Ackner LJ in *British Leyland UK Ltd. v. Swift* [1981] IRLR 91, 93. "An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees, from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as special."
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> In any event the charge proved against the appellants constituted very grave misconduct involving the core of the 2nd Respondent's existence and they must have been aware that dismissal would have been the inevitable punishment. The contention relating to

discriminative practice was misconceived because the five other employees treated differently from the appellants were never adjudged guilty of the misconduct which was proven against the appellants.

Submissions

[24] Learned counsel for the appellants submitted that the courts below had erred in fact and/or in law when they had failed to find that the first respondent had committed grave errors of law in agreeing with the second respondent's finding that the appellants' misconduct warranted the ultimate punishment of dismissal. It was contended that in the light of the first respondent's finding that the misconduct was a minor one the court should have held that the punishment of dismissal was too harsh warranting the court's interference.

[25] It was further submitted that the courts below had failed to take into account the following undisputed facts and that if the courts below had done so, they would have had reached a different conclusion. The undisputed facts are as follows:

(a) the appellants were all long standing employees of the bank with no misconduct or past records of disciplinary problems;

(b) there were approximately 40 people who participated in the picketing but action was only taken against 15 of them;

(c) whilst the appellants were dismissed, the following was the action taken against the other five:

(i) Rohana bte Abdul Samad who received suspension and show cause letter for allegedly participating in an unlawful picket on 21 February 2003 was not called to attend a domestic inquiry and reported back to work. In the video footage it can be seen that she carried a balloon into the lobby and banking hall which she released. In this regard, the company justified its actions on the basis that she had shown remorse by giving an apology letter. However, even assuming that remorse is a mitigating factor, it is not disputed that there was evidence in the court below and as averred in para. 8.2 of the affidavit-in-reply of the appellants that the union adopted a draft letter through the company to the Malaysia Commercial Bank

Association, apologising over the incident. This is further corroborated by the union's letter to the bank dated 21 November 2003 which appears at p. 1583 rekod rayuan (bahagian C) jilid 13;

(ii) Ahmad bin Kassim was found not guilty despite being one of the group of picketers who successfully forced his way through the common lobby of the premises, wearing the protest badge "BCB Menipu Pekerja";

(iii) Zamir bin Ahmad was found not guilty despite being one of the group of the picketers who successfully forced his way through the common lobby of the premises, wearing the protest badge "BCB Menipu Pekerja" and carrying a placard in the lobby area;

(iv) Noor Jam bin Kader Mohiden was found not guilty despite being one of the group of picketers who successfully forced his way through the common lobby of the premises, wearing the protest badge "BCB Menipu Pekerja" and carrying a balloon in the lobby area of the banking hall; and

(v) Maimunah bte Mat Nor was found guilty as she was one of the group of picketers who successfully forced her way through the common lobby of the premises, wearing the protest badge "BCB Menipu Pekerja" and carrying a balloon into the lobby area and banking hall. However, the disciplinary committee handed down a punishment of stoppage of increment for two years and did not dismiss her summarily as was done to the ten appellants.

[26] It was therefore contended by the appellants that the punishment of dismissal meted out was too harsh and not proportionate to the alleged misconduct committed and that, the second respondent was guilty of unequal treatment and double standards.

[27] In her submission, learned counsel for the appellants referred to the case of *Sunmugam Subramaniam v. JG Containers (M) Sdn Bhd & Anor* [2000] 6 CLJ 521 where the High Court quashed an Industrial Court's award purely on the basis that the company had been guilty of inconsistency of punishment and that the punishment was being too harsh.

[28] Learned counsel for the appellants also referred to the decision of the Industrial Court in *Chartered Bank v. National Union of Bank Employees* [1983] 2 ILR 111 where the Industrial Court held that the dismissal was unfair despite misconduct being proven on the basis that the punishment was too harsh and the bank adopted double standards in meting out punishments.

[29] Another case referred to by learned counsel for the appellants in her submission was the decision of the High Court in *Yahaya Talib v. Southern Bank Berhad & Anor* [2009] 1 LNS 1785 where the High Court held that the punishment of dismissal was wholly disproportionate to the offence committed by the employee who was an officer of the bank with 31 years of unblemished service.

[30] For the second respondent it was submitted that on the facts of this case the courts below had in fact addressed the appropriateness of the punishment meted out against the appellants based on their participation in the unlawful picket on 21 October 2003 and noted the industry they were employed in. The second respondent contended that the punishment meted out was proportionate to the misconduct that the appellants were found guilty of. Once unlawful picket had been established, the punishment of dismissal was warranted.

[31] Learned counsel for the second respondent also contended that the conduct of the appellants must be scrutinised from the time the show cause letter was issued to the opportunity to mitigate. The appellants showed no remorse. They were members of a trade union and employees of a premier financial institution whose reputation had been tarnished by their conduct of trespassing into the lobby and banking hall during banking hours on 21 October 2003.

[32] Lastly, it was contended by the second respondent that the banking industry belonged to a special kind of business and services rendered to the public. As such, a high quality of discipline and conduct of the highest order is expected of its staff to win public confidence. In support of that proposition learned counsel for second respondent cited the following Industrial Court cases:

(a) *Perwira Habib Bank (M) Bhd v. Tan Teng Seng* [1997] 2 ILR 839;

(b) *Azizan Abd Ghani lwn. Bumiputra-Commerce Bank Berhad* [2012] 3 ILR 436;

(c) *Abdul Wahab Hj Suboh v. CIMB Bank Berhad* [2012] 4 ILR 445; and

(d) *Hongkong Bank Malaysia Berhad v. Jaafar Ahmad Thani* [2007] 4 ILR 601.

Decision

[33] It is trite law that the function of the Industrial Court under s. 20 of the Industrial Relations Act 1967 is twofold, first, to determine whether the alleged misconduct has been established, and secondly whether the proven misconduct constitutes just cause or excuse for dismissal. Failure to determine these issues on its merits would be a jurisdictional error which would merit interference by *certiorari* by the High Court (see *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449; [1995] 3 MLJ 537).

[34] On the facts of the case we are satisfied that the alleged misconduct by the appellants had been proved. We agree with the observation made by the High Court that the Industrial Court had made findings of facts in respect of each appellant upon viewing the CCTV recordings. The Industrial Court did not commit any error of law in its findings of facts in respect of the appellants' misconduct.

[35] The main issue in this appeal as highlighted by both counsel in their submission is whether the proven misconduct warranted the punishment of dismissal. This issue is more commonly known as the "harshness rule" or the "proportionality rule". In the instant case both the High Court and the Court of Appeal declined to interfere with the second respondent's decision to terminate the services of the appellants. It is pertinent to mention here that the Court of Appeal made two observations on the punishment imposed upon the appellants. First, the appellants' argument relating to victimisation was patently untenable as it was premised on conjecture and secondly, the charge proved against the

appellants constituted a very grave misconduct involving the core of the second respondent's business and the appellants must have been aware that dismissal would have been the inevitable result.

[36] On 8 October 2013 this court, in *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409 ("*Panzana*") held that the Industrial Court had the jurisdiction to decide whether the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under s. 20(3) of the Industrial Relations Act 1967. The Industrial Court, in exercising such functions, could rely on its powers under s. 30(5) of the Industrial Relations Act 1967 based on the principle of equity, good conscience and substantial merits of the case. It was further held that the doctrine of proportionality of punishment was inbuilt into the Industrial Relations Act 1967 through item 5 of the second schedule. The Industrial Court could substitute its own view as to what was the appropriate punishment for the employee's misconduct, for the view of the employer concerned.

[37] In *Panzana* the questions of law posed for court's determination were as follows:

> (a) whether the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and/or that the punishment of dismissal was too harsh in the circumstances, when handing down an award under s. 20(3) of the Industrial Relations Act 1967.
>
> (b) Further and/or in the alternative whether the Industrial Court in exercising its function as stated in the paragraph above can rely on its powers under s. 30(5) of the Industrial Relations Act 1967 specifically based on the principle of equity, good conscience and substantial merits of the case.

[38] The court answered the two questions posed in the affirmative. However, on the facts and circumstances of that case the appeal was dismissed.

[39] As a result of the decision in *Panzana* the answer posed in the instant appeal has also to be in the affirmative. However, that does not dispose of this appeal. We have now to examine whether

the decision of the Industrial Court that such misconduct did warrant a dismissal was a reasonable decision in the circumstances of the case.

[40] We shall deal first with the appellants' contention that the second respondent was guilty of unequal treatment and double standards because five of the employees who were charged together with the appellants were not dismissed. On this issue we agree with the observation made by the Court of Appeal that there was no merit in the appellants' contention that the appellants' dismissal was actuated by discriminative practice. From the record, the allegation of the inconsistency of punishment of the five employees who were charged together with the appellants was misconceived. Three of the five employees, namely Zamir bin Ahmad, Noor Jam bin Kader Mohiden and Ahmad bin Kassim were found not guilty of the charge in the domestic inquiry that was conducted against them. Their suspensions from work were therefore uplifted. In respect of Maimunah bte Mat Nor, she was found guilty of the charge. However, taking into consideration her plea of mitigation, the second respondent uplifted her suspension and imposed the punishment of stoppage of increment for a period of two years with effect from January 2005. In respect of Rohana bte Abdul Samad, the second respondent, after taking into account her written explanation dated 21 November 2003, uplifted her suspension. She was instead issued with a caution letter dated 4 December 2003. These facts were taken into the consideration by the Industrial Court when it considered the fairness or otherwise of the dismissal of the appellants.

[41] The appellants provided a common defence to the allegation of unlawful picket on 21 October 2003 within the premises. They basically denied the allegations. In the letter dated 21 November 2003 signed by the General Secretary of NUBE, they contended that the picket on 21 October 2003 was in compliance with the proviso to s. 40(1) of the Industrial Relations Act 1967. When they were asked to submit their plea of mitigation they responded *vide* their standard letters dated 19 April 2004. In these letters they said:

> As mitigation, I enclose herewith a letter dated 7.4.2004 from the office of the Prime Minister / Minister of Finance address to the Chairman of the Bank YB Tan Sri Radin Soenarno Al-Haj.

> I hope the Bank will consider the contents of the letter in the spirit and the intendment in which that letter was written and all the circumstances of this case.

[42] Unlike Maimunah bte Mat Nor and Rohana bte Abdul Samad, the appellants did not apologise to the second respondent for their actions even though they were given the opportunity to do so. They showed no remorse. The conduct of the appellants after the offence was established must be taken into account in deciding whether it was reasonable to dismiss them or not. In *British Leyland UK Ltd v. Swift* [1981] IRLR 91 at p. 93 Lord Denning said:

> But there is a further point. It is whether the Industrial Tribunal took into account all relevant considerations. It seems to me that they failed to take into account the conduct of Mr Swift after the offence was discovered. He did not come forward and say. 'I am sorry; I made a mistake, I ought not to have done it. It will not do anything of the kind again'. He did not even tell the same story he told to the police officer. He put forward a 'cock and bull' story about his having lent his Land Rover to another man: and the other man had got the tax disc: and it was the other man's fault: and so forth. As to that, the Industrial Tribunal were quite outspoken. They said: 'It is flying in the face of probability to suggest that he and Mr Rawlins were giving a truthful and accurate account'. So there it is. Mr. Swift did not 'come clean' when he was found out. He put forward a wholly untruthful and accurate account'. That seems to me to be a most relevant consideration for the employers to take into account in deciding whether it was reasonable to dismiss him or not ...

[43] With regard to the appellants' contention that the courts below did not take into consideration the fact that the appellants were all long standing employees of the bank with no past records of disciplinary problems, we agree with the appellants that this is one of the matters that ought to be taken into consideration in deciding whether it was reasonable to dismiss them or not. However, there is no fixed rule of law to suggest that it was unreasonable to dismiss employees with unblemished records for a single instance of insolence. It depends on the nature of the misconduct. In this connection Lord Evershed MR opined in *Laws v. London Chronicle Ltd* [1959] 2 All ER 285 at pp. 287 and 288:

> In the present case, the learned judge, in the course of his judgment, said:

> It is clear and sound law that to justify dismissal for one act of disobedience or misconduct it has to be of a grave and serious nature.
>
> Later he concluded, in the plaintiff's favour, that what she had done, or not done, on June 20, 1958, was not sufficiently grave to justify dismissal. With all respect to the learned judge, I think that his proposition is not justified in the form in which he stated it. I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that the disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions.

[44] In the instant case the appellants participated in an unlawful picket in the lobby and the banking hall of BCB Building. They barged through the side entrance door despite attempts by security personnel to prevent them from doing so. They entered the second respondent's business premises with picket materials. They carried placard and balloons, noisily distracting customers and colleagues. The balloons were released in the banking hall. This was clearly a wilful disobedience on the part of the appellants. Their action brought the bank into disrepute among customers and other employees. The Industrial Court did take into consideration the misconduct and the fact that the second respondent was in the banking industry. In a number of cases, the Industrial Court had held that the banking industry belonged to a special kind of business and services rendered to the public. Therefore a high standard of care and conduct was expected of an employee in the banking industry.

[45] On the facts of the case we agree with the observation made by the Court of Appeal that the charge against the appellants was a very grave misconduct involving the core of the second respondent's business and the appellants must have been aware that dismissal would have been the inevitable punishment.

A **[46]** For the reasons given we answer the question posed in the affirmative. Based on the facts and circumstances of this case the dismissal of the appellants by the second respondent was fair and was proportionate to the misconduct committed by them.

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